In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

INDEX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RELEVANT DOCKET ENTRIES

UNITED STATES OF AMERICA
v.
CECIL J. BISHOP, DEFENDANT

No. 14897
Cr-70-218

26 USC 7206(1)—Willfully subscribing and making false returns.
3—counts

4/22/70 Filed Order for Transfer, from Northern District of California, San Francisco, Calif.
Filed Summons on Return Executed.
Filed Indictment.
Motion for Transfer Case to U.S. District Court for the Eastern District of California.
Filed Affidavit In Support of Defendant's Motion to Transfer Case.

5/1/70 Reg. this date for arraignment. No appearance for deft. William B. Shubb, Esq., present for Gov't and on his motion ordered summons Issued, via mail service. (TJM)

5/4/70 Issued Summons. Address: Suite 408, 1007—7th St., Sacto, Calif., Returnable May 12, 1970.

5/12/70 Reg. this date for arraignment. Deft present with Counsel C. Richard Johnston, Esq., William B. Shubb Esq., AUSA present for the U.S., Deft arraigned, Stated his true name as charged, Counsel waived reading of Indictment and deft. entered a plea of NOT GUILTY TO EACH CHARGE, TRIAL BY JURY WAS DEMANDED AND Case set down for jury for August 17th, 1970 at 10:00 A.M. Counsel for the deft allowed 30 days from this date to make pre-trial motions in connection with this matter. Deft released on his OR. (TJM)

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12/21/70 Reg. for fur. trial, court instructed jurors, and jurors retired at 10:45 AM for deliberation. Ord. U.S. Marshal furnish lunch to jurors, the jurors returned into court at 4:30 PM and rendered the following verdict:

"We, the jury, find Cecil J. Bishop, the defendant at the bar, Guilty as to Count 1, Guilty as to Count 2, Guilty as to Count 3. /s/ Rex Knoles, Foreman."

The jurors were polled & all members confirmed their vote, whereupon the jurors were dismissed. Ord. case referred to the probation office for pre-sentence investigation & report & case cont'd to Jan. 7, 1971 for judgment. O. R. (TJM)

Filed verdict

* * * * *

2/11/71 Reg. this date for judgment on 3 Counts. Deft present with counsel J. Richard Johnston, Esq., John Kilgariff, Esq., AUSA., Probation Officer present. After hearing all parties at some length, Ordered deft imprisoned for a period of Two (2) years as to each count and such sentence to run concurrently with each other, The first 90 day (sic) of each sentence to be spent in a jail type institution and these sentences also to run concurrently with each other. Remainder of each sentence suspended and deft placed on Probation for period of Five (5) Years, following jail term, which is to be served during Forty-Five 48-hour weekends. As a Condition of probation deft is ordered to pay a fine in the sum of Five Thousand ($5,000) within Six (6) Months after implementation of sentence. Execution of sentence Ordered stayed pending outcome of appeal. Notice of which filed this date. Deft released on OR. (TJM)

Filed NOTICE OF APPEAL

2/16/71 Filed Judgment and Commitment (Entered February 16th, 1971).

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6/16/71 Mailed Record to Ninth Circuit Court of Appeals.

JAMES L. BROWNING, JR.
United States Attorney
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, v. CECIL J. BISHOP, DEFENDANT.	Criminal No. Violation: Title 26 U.S.C. Section 7206 (1) - Willfully Subscribing and Making False Returns.

INDICTMENT

FIRST COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury charges: THAT

On or about April 15, 1964, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1963, in his name which was verified by the defendant by a written declaration that it was made under the penalty of perjury, which said income tax return for the calendar year 1963 the defendant did not believe to be true and correct as to

every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $45,654.44 in the year 1963, whereas as he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $20,923.87.

SECOND COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury further charges: T H A T

On or about April 14, 1965, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1964, in his name, which was verified by the defendant by a written declaration that it was made under the penalty of perjury which said income tax return for the calendar year 1964 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $44,360.50 in the year 1964, whereas, as he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $17,021.70.

THIRD COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury further charges: T H A T

On or about April 14, 1966, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1965, in his name, which was verified by the defendant by a written declaration that it was made under the penalty of perjury, which said income tax return for the calendar year 1965 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $42,111.74 in the year 1965, whereas, he then and there

well knew, he had in truth and in fact, overstated the amount of said farm expenses to the extent of $10,126.86.

A True Bill.
/s/ E. E. Posten
Foreman

/s/ James L. Browning, Jr.
JAMES L. BROWNING, JR.
United States Attorney
(Approved as to Form:
.....)

SACRAMENTO, CALIFORNIA, MONDAY, DECEMBER 21, 1970.

9:00 O'CLOCK A.M.

THE CLERK: Case Number 14897, United States versus Bishop.

THE COURT: Jury all present; defendant present with counsel.

Now, ladies and gentlemen of the jury:

You have heard the testimony of the witnesses, and you have heard the arguments of counsel. It is now my duty to instruct you as to the legal principles which enter the case.

You are the judges of the facts, and that includes the determination by you of the guilt or innocence of the defendant. Where the evidence is conflicting, it is your duty to resolve that conflict and determine what is the truth.

In the performance by you of your duty as judges of the facts, you may not act arbitrarily, as ours is a government of laws and not of men and you are governed by rules of law. It is my duty as judge of the Court to announce those rules of law to you, and it is your duty as jurors to apply the law. You must base your determination of what the facts are upon the evidence introduced at the trial and upon the evidence alone.

Now, sometimes when the use of a pronoun is appropriate in an instruction, the masculine only will be used as a convenience in composition although the instruction may refer and apply to a defendant, or a witness, or another person who, in the case on trial, is a female person. Whenever a masculine pronoun is used in these instructions, its reference embraces such a female person to the same effect as if the corresponding female pronoun were substituted.

Now, in these instructions I in no manner or form intend or desire you to understand that I am expressing any opinion as to the guilt or innocence of the defendant, or upon the weight of any evidence, or as to the truth or falsity of any statements or any witnesses in the case, or as to any inference that you should draw from any of the testimony, or as to whether any alleged fact is or is not proven.

If the Court has at any time during the trial asked any

questions, made any ruling, and used any language or done anything which seemed to you to indicate the opinion of the Court as to any question of fact, you must not be influenced thereby, but must determine for yourselves all questions of fact, without regard to any opinion you may suppose the Court may have or entertain. The question of the guilt or the innocence of the defendant is for you alone, regardless of what the Court or anybody else may think about it.

To state the matter in another way, let me say that I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to whether witnesses are, or are not, worthy of belief; what facts are, and are not, established; what inferences should be drawn from the evidence; or any opinion concerning the guilt or innocence of the defendant. If any statement, expression or act of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Now, there are certain rules that apply to all criminal cases. I shall now give them to you to aid in determining the weight of the evidence in this case, and how you should adjudge the evidence that has been presented to you for your consideration.

The function of the jury is to try the issues of fact that are presented by the allegations in the indictment filed in this court and the defendant's plea of not guilty. This duty you must perform uninfluenced by pity for the defendant or by passion or prejudice against him. Additionally, the law forbids you to be governed by suspicion or by sentiment, conjecture, sympathy public opinion or public feeling. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested or because an indictment has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or speculate from any or all of them that he is more likely to be guilty or innocent.

Suspicious circumstances are not in themselves sufficient to convict the defendant; rather the prosecution must prove the defendant's guilt to a moral certainty and beyond a reasonable doubt. If, after considering all the evidence in the case, you find that there are more than suspicions,

even though strong suspicions, as to the guilt of the defendant, or that the evidence only creates suspicious circumstances pointing to his guilt, you must return a verdict finding the defendant not guilty.

The indictment, as I have just stated previously, is but a formal method of accusing the defendant of a crime. It is not evidence of any kind against the accused and does not create any presumption or permit any inference of guilt.

Now, both the Government and the defendant have a right to demand, and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a verdict, regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. While you can consider only the evidence in the case in reaching your verdict, you are not limited to the bald statements of the witnesses in the consideration of their testimony. On the contrary, you are permitted to draw from the facts, which you find have been proven, such inferences as seem justified in the light of your own experiences. An inference is a deduction or conclusion which reason and common sense leads one to draw from facts which have been proven.

A presumption is a conclusion which the law requires the jury to make from particular facts. Unless declared by law to be conclusive a presumption may be overcome or rebutted by direct or indirect evidence which is contrary to the fact presumed. Unless a presumption is so overcome or rebutted, the jury is bound to find in accordance with the presumption.

Now, it is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it, or speculate as to what the witness would have said if permitted to answer.

Likewise, if any evidence was stricken from the record by the Court or refused admission by the Court, it must be entirely disregarded by you and you must treat such evidence as if you had never heard it or seen it, and if any counsel intimated by any of his questions that certain hinted facts were or were not true, you must disregard any such intimations and you must not draw any inference from it.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Now, the attorneys have discussed the law during the course of their respective arguments. They had a perfect right to do this. I would caution you, however, that you must look to these instructions and nowhere else for the law that will guide you in your deliberations in this trial. If the attorneys, or anyone else, have suggested, or if any of you believe that the law is other than it is given to you in these instructions, I charge you that you must be guided by the rules of law given to you in these instructions to the complete exclusion of any other suggested, or otherwise apparent rules of law.

Now, a criminal—strike that.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This simply means that the burden of proving the guilt of the defendant rests upon the prosecution; that is, upon the Government of the United States in this instance, and that burden includes the proof beyond a reasonable doubt of every element of the offense necessary to be proven. Unless and until outweighed by evidence in the case to the contrary, the law presumes, as I have just stated, that a person is innocent of crime or wrong; that official duty has been regularly performed; that private transactions have been fair and regular, that the ordinary course of business or employment have been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and the law has been obeyed.

A defendant is not required to prove himself innocent nor to put in any evidence at all upon the subject of his innocence. In considering the testimony of the case you must look at that testimony and view it in light of the presumption with which the law clothes the defendant; namely, that he is innocent. It is a presumption that abides with the defendant throughout the trial of this case unless the evidence convinces you to the contrary beyond a reasonable doubt.

The presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of his guilt from all the evidence in the case.

There are certain standards that you can take into account in weighing the evidence of the case. As I have previously stated, one of the basic principles is that you cannot bring in a verdict of guilty unless you are convinced beyond a reasonable doubt of the guilt of the defendant.

I will define for you the term "reasonable doubt." It is precisely what the term implies. It is a doubt based upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt which is perhaps imaginary or fanciful, or one that is perhaps capricious or speculative. It simply means an honest doubt that appeals to reason and is founded upon reason. If in this case, after you have considered the evidence, you have such a doubt in mind as would cause you or any other prudent man or woman to hesitate in some matter of grave concern in your own minds, then you have a doubt as the law contemplates as a reasonable doubt.

While a defendant cannot be convicted unless his guilt of the crime charged is established to a moral certainty and beyond a reasonable doubt, the law does not require a demonstration; that is, such a degree of proof, as excluding the possibility of error, produces absolute certainty, because such proof is rarely, if at all, possible. Moral certainty alone is required; that is, that degree of proof which produces conviction in an unprejudiced mind.

Now, as I previously stated, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified,

and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider such witnesse's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Stated another way, whether or not you believe the witnesses who have testified in the case and the weight that is to be attached to the testimony given by them, as I have stated previously, is a matter for your exclusive judgment. In this case, as in all cases, we start out with a presumption that every witness speaks the truth. We presume when a witness allows himself to be sworn to tell the truth that in fact he came here to tell the truth. However, this presumption may be repelled in several ways. Among the ways that it may be repelled are:

The manner in which the witness testifies;

His demeanor on the witness stand;

By the character of his testimony;

By his bias or prejudice, if any, for or against one or any of the parties;

By contradictory evidence, or by contradictory statements;

By his motives;

By evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony;

By evidence that he knowingly testified falsely concerning any material matter;

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness in whatever manner is for you to determine.

In passing on the credibility of the various witnesses who have testified here on the witness stand, you may accept all or any part of the testimony or you may disregard or reject all or any part of the testimony of any witness.

For instance, if it has been demonstrated to you during the trial of the case that any witness has wilfully testified falsely as to a material point, it is your right to reject all of that witness's testimony, to distrust, and not to consider it unless you shall be convinced from the evidence that the witness has in other particulars told the truth.

You are not to be swayed by the fact that there may be a larger number of witnesses on one side of the case than on the other. It is not the number of witnesses that determines the weight of the evidence, but it is the credibility of the witnesses who testify that is the deciding factor in determining the amount of weight you should attach to the testimony.

Now, you are instructed that neither the Government nor the defendant is bound by the testimony of witnesses which it calls to the stand in a criminal case.

Either the Government or the defendant may offer part of what a witness says as the truth and contend against a part that it does not consider true. Similarly, you members of the jury may accept a part of what the witness says, and you may reject another part of what a witness says.

I refer to the demeanor of the witness on the witness stand. By demeanor is meant such things as whether a witness appeared to be hostile, reluctant, evasive, obtuse, timid or deceitful; or on the contrary, appeared to be impartial, straightforward, unconcealing, intelligent, confident, or guileless.

Conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge,

may be considered by the jury in the light of other evidence in the case, in determining the guilt or innocence of the accused.

When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance if any to be attached to any such evidence, are matters for determination by you, the jury.

Now, the defendant has testified in this case. In so doing, he has become a witness in the case and as such must be treated according to the same standards that apply to the testimony of any other witness.

There are two classes of evidence recognized and received in the courts upon either of which—what is the problem, Mr. Nevis?

THE CLERK: I am shy a marshal.

THE COURT: We will wait until one shows up, Mr. Nevis.

THE CLERK: I can stand at the door.

THE COURT: Will you please?

There are two classes of evidence recognized and received in the courts upon either of which, or a combination of which, a defendant may be convicted of a crime. One is direct evidence—the testimony of an eyewitness as to what he or she has seen or heard. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case regardless of whether it is direct evidence or circumstantial evidence or a combination of both.

Now, if the evidence in this case is susceptible to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt

of the defendant and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of his innocence, and reject that which points to his guilt.

Now, you will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty; namely that you shall be convinced of such guilt beyond a reasonable doubt.

The Court cautions you to distinguish carefully between facts testified to by the witnesses and the statements made by the attorney in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict, consider only the facts testified to by the witnesses; you will remember at all times that statements of counsel in their argument or presentations are not evidence in the case. And if counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

Now, in this case you have heard the testimony of a person called as an expert witness based upon his analysis of certain records which have been introduced in evidence. This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary experience of mankind and which requires special training or study to understand.

The law allows those skilled in special fields to express opinions and to say whether or not, according to their knowledge and experience, a fact may or may not exist.

Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the

testimony of experts, and the testimony of such experts is to be considered and weighed as that of any other witness.

Just so far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called as an expert, and gives opinions upon a particular point, does not necessarily obligate the jury to accept his opinions as to what the facts are.

The testimony of an accountant and any summaries or charts prepared by him and admitted into evidence are competent for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence. However, such charts or summaries are not in and of themselves evidence or proof of any facts. So if you should find that such charts or summaries do not reflect facts and figures shown by the books, records, documents and other evidence in the case, you must disregard them.

That is to say, such charts or summaries are used only as a matter of convenience, and unless you find that they are in truth summaries of facts and figures shown by the evidence in this case, you are to disregard them entirely.

In every criminal case the Government must first establish the fact that a crime has been committed. This is known as the corpus delicti in the law.

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

The crime charged in this case requires proof of specific intent before a defendant can be convicted.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in a certain conduct.

A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertance or other innocent reason.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can

be no eyewitness account of the state of mind with which the acts were done or omitted.

But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

In determining the issue of intent—strike that.

In determining the issue as to intent, the jury are entitled to consider any statement made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

Now, the indictment, as you have been previously informed, is in three counts or charges.

The first count charges that: On or about April 15, 1964, in the Northern District of California, Cecil J. Bishop, defendant herein, did wilfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1963, in which his language was verified by the defendant by written declaration that it was made under the penalties of perjury, which said income tax return for the calendar year 1963 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $45,654.44 in the year 1963, whereas he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $20,923.87.

In violation of Section 7206(1), Internal Revenue Code of 1954; Section 7206(1), Title 26, United States Code.

Now, the second and third counts of the indictment make the same charge except that they relate to the calendar years 1964 and 1965, respectively, and the amounts of the overstatements of farm expense deductions and the pertinent dates are different.

Now, to the charges contained in the indictment that I

have just referred to, the defendant has entered a plea of not guilty and that puts in issue every material allegation contained in the indictment.

Now, the offenses charged in the indictment are based on alleged violations of a statute enacted by Congress, namely Section 7206(1) of the Internal Revenue Code of 1954; this statute provides in part as follows:

"Any person who wilfully makes and subscribes any return which contains or is verified by written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of an offense."

The gist of each offense charged in the indictment is the wilful making and subscribing by the defendant of a return containing or verified by a written declaration that it is made under the penalties of perjury and which the defendant did not believe to be true and correct as to every material matter. To prove its case, the Government must establish the following three elements:

One, a wilful making and subscribing of a return incorrect as to a material matter;

Two, the return must contain the written declaration that it is made under the penalty of perjury;

Three, the maker must not believe the return to be true and correct as to every material matter.

In the first count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1963 income tax return to the extent of $20,923.87. This amount consists of the following items:

(A) All checks issued by the defendant to Louise Bishop which are listed under the heading "farm" in a schedule attached to the defendant's 1963 income tax return, totaling $16,423.87.

(B) Payments to Bank of America, $4,500.

Total: $20,923.87.

For the purpose of this proceeding, the Government does not claim that any deductions were overstated in the defendant's 1963 return, and I instruct you that in determining the defendant's guilt or innocence on the first count, you are not to concern yourselves with any other deductions claimed in the return except those which may be duplicative of the above.

In the second count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1964 income tax return to the extent of $17,021.70. This amount consists of the following items:

(A) Payments to Louise Bishop on January 27th, 1964, $5,500.

(B) Payments to Louise Bishop which the Government alleges she used to pay for swimming pool upkeep, flowers and plants, extra groceries for the defendant's weekend guests and other non-business expenses in the total amount of $6,521.70.

(C) Principal portion of a $5,038.82 payment to the Bank of America on November 6, 1964, $5,000.

I should state that a little better than it is stated, in other words, it's principal portion of the $5,038.82 payment to the Bank of America on November 6, 1964, the principal payment being $5,000. So those three items together total $17,021.70.

Now, for the purpose of this proceeding, the Government does not claim that any other deductions were overstated in the defendant's 1964 return, and I instruct you that in determining the defendant's guilt or innocence on the second count, you are not to concern yourself with any other deductions claimed in the return.

Now, in the third count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1965 income tax return to the extent of $10,126.86. This amount consists of the following items:

Amount paid Louise Bishop by Cecil Bishop, $18,331.48.

Less farm expenses actually accounted for by Louise, $13,513.52.

So the difference in the way of non-deductible farm expenses for that year claimed by the Government is $4,817.96. I am going to let you take this particular instruction into the jury room with you. Otherwise, I cannot expect you to remember these figures. So I am going to allow you to take this instruction in with you.

The difference there, then, is $4,817.96.

And the next item is:

Payment to Crocker Citizens Bank on Louise Bishop's loan, $864.

Monies paid to Robert Bishop for his living expenses and education, $2,212.50.

Principal payments to Bank of America on loan to Cecil, $4,882.40.

For a subtotal of $12,776.86.

Less salary paid Louise and not claimed in return, $2,650, for a total net claimed alleged overstatement on the part of the Government claimed against the defendant of $10,126.86.

Now, for the purposes of this proceeding, the Government does not claim that any other deductions were overstated in the defendant's 1965 return, and I instruct you that in determining the defendant's guilt or innocence on the third count, you are not to concern yourselves with any other deductions claimed in the return.

Now, it is not necessary for the Government to prove that the exact amount of the overstatements of farm expense deductions were exactly the amounts charged in the indictment. The precise amounts of the overstatements are not the gist of the offense and the Government is not held to prove exact figures. To find the defendant guilty, you must find that he wilfully and knowingly subscribed or signed his name to his income tax return or returns under the penalties of perjury, knowing that he had overstated a substantial amount of his farm expenses deduction in his income tax return or returns, and what is a substantial amount under the circumstances of this case is a factual matter for the determination of you, the jury. Whether or not the Government has suffered a pecuniary or monetary loss as a result of the alleged false returns is not an element of the offenses as charged in the indictment.

The offense as charged in the indictment is complete when a person wilfully makes and subscribes a return, under the penalty of perjury, which he does not believe to be true and correct as to every material matter.

Now, in connection with the three counts of the indictment wherein the defendant is charged with subscribing under the penalties of perjury his 1963, 1964 and 1965 income tax return, respectively, it is your duty, members of the jury, to concern yourselves solely with the following questions of fact:

Whether the returns—and I realize I sound like I am repeating myself a great deal. But, nevertheless, when the judge and the lawyers—we know this. This is in our minds,

but we want to be sure you understand completely the function that you are to perform when you get in the jury room and the elements of the offense required to be proved in order to find this defendant guilty. So you listen carefully, again, to these specific requirements.

You are concerned with the following questions of fact:

(A) Whether the returns in question were made and subscribed or signed by the defendant.

(B) Whether the defendant, if he made and subscribed the returns, acted wilfully at the time of making and subscribing them.

(C) And whether the defendant, if he made and subscribed these returns, believed the alleged false statements to be true and correct as to every material matter.

Now, if you find that the defendant signed his individual income tax returns, you may consider that as a circumstance in determining whether he had knowledge of the contents of those returns. But the fact that he signed a return does not necessarily prove that he has knowledge of any particular item or amount set forth in the return.

Now, although the defendant is herein charged with overstating a substantial amount of his farm expense deductions on his income tax returns for the years 1963, 1964 and 1965, the Court, nevertheless, permitted evidence of deductions claimed for the years 1961 and 1962. Such evidence is to be considered by you only insofar as you find it bears upon or relates to the intent of the defendant, if you find that he overstated a substantial amount of his farm expense deductions on his income tax returns for the years involved in the indictment. In other words, such evidence was admitted for the purpose of showing or throwing light upon the state of mind or intent of the defendant when overstating a substantial amount of his farm expense deductions on his income tax returns.

It is not enough if all that is shown is that the defendant was stubborn, or stupid, or careless, or negligent. A defendant does not wilfully make a return which he does not believe to be true and correct as to every matter simply because he is careless or neglectful about keeping his records, or makes errors of law, or because he in good faith acts contrary to regulations laid down by the Treasury Department, or fails to seek the advice and assistance of a

lawyer or accountant. None of these attitudes or acts is a crime under the Internal Revenue law.

As I have previously stated, the question of intent is a matter for you, as jurors, to determine. And as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and the circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question.

Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

On the question of intent to make and subscribe a false return, you may consider certain facts as pointing to such intent, if you find that they exist in this case. These are illustrations: A consistent pattern of overstating farm expense deductions, a large disparity between reported and actual farm expense deductions, and a substantial disparity between a person's reportable taxable income and his standard of living if the latter cannot be satisfactorily reconciled with the person's reported taxable income and other available assets.

Under the Internal Revenue laws, an employer is entitled to deduct all of his ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. The amount that an employer may deduct as a compensation paid to an employee is not necessarily limited to the payments that he labels as "salary," but includes also the total amount actually paid to the employee as compensation for services, if those amounts are reasonable and are in fact payments purely for services.

If you find that Louise Bishop received from the defendant Cecil Bishop monies in addition to the amounts agreed upon by them as "salary," and if such monies were really compensation for her services in managing the defendant's

ranch and were reasonable in amount, you may conclude that the defendant was entitled to deduct such amounts on his income tax returns, and if not really compensation for her services in managing the ranch of the defendant or were not reasonable in amount, you may conclude that the defendant was not entitled to deduct such amounts on his income tax return.

In each of the counts in the indictment, the defendant is charged with overstating certain deductions for farm expense on his individual income tax returns. In determining whether they were false as to a material matter, you should consider whether or not the items alleged to be false were essential or useful to the Internal Revenue Service in ascertaining the corrections of the tax declared or in verifying or in auditing the returns of the taxpayer.

You are instructed that farm expenses are a material matter in the defendant's income tax returns for 1963, 1964 and 1965.

You will note that the acts charged in the indictment are alleged to have been knowingly.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of a mistake, inadvertance or other innocent reason.

With respect to offenses such as charged in this case, as I have previously stated, knowledge must be proved before there can be a conviction.

You will note that the acts charged in the indictment are alleged to have been done wilfully.

An act is done wilfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

There is a distinction between the civil tax liability of the defendant and his criminal liability. This is a criminal case and has nothing to do with the collection of taxes which the defendant may owe, if any. The question of whether he owes any taxes and, if so, how much, will not be determined by the outcome of this trial but rather is the subject of a separate type of proceeding, and you should give no thought to that matter in arriving at your decision in this case.

Now, the defendant has introduced evidence of his good reputation in his community prior to the indictment in this case. Such evidence may indicate to the jury that it is

improbable that a person of good character would commit the crime charged. Therefore, the jury should consider this evidence along with all the other evidence in the case in determining the guilt or the innocence of the defendant. The circumstances may be such that evidence of good character may alone create a reasonable doubt of the defendant's guilt, although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all the evidence, including the evidence of good character, is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment.

Now, if you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of various witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such point of difference, affects the true issues in this case. Examine such discrepancies or inconsistencies and such disputed points, and ask yourself these questions: How does the decision of this, or that, or the other discrepancy or matter in dispute affect the guilt or the innocence of the defendant?

Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourself the main question: Did or did not the defendant commit the offense charged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth or the guilt or the innocence of the defendant, then such discrepancies or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them.

Now, it is your duty as jurors, and as I have stated, to try this case as to the facts, upon the evidence introduced at the trial; and upon the law as given you by the Court in these instructions. The Court, however, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction, you must construe it in the light of and in harmony with

every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.

You must not consider the question of possible punishment of the defendant in this case. That subject is of no concern to you. To you is committed the sole question of determining the guilt or innocence of the defendant. It is exclusively in the province of the Court to determine what punishment, if any, is to be meted out and that question arises only if the jury finds the defendant guilty.

Now, I think I have now given you as briefly as possible for me to do the various rules and principles which are to govern you in your deliberations and in your determination of the factual questions which are yours for decision.

If you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room, and if, after you have fully discussed the case between you, you are satisfied that your original view was erroneous, I ask that you do not be stubborn, and in that situation do not hesitate to change your views. However, if, after a full exchange of views with your fellow jurors, you still feel that you are right, of course, you should maintain your position and you should not surrender it merely for the purpose of arriving at a verdict or merely because the majority of the jurors have the opposite leaning.

Upon retiring to the jury room, you will select one of your number to act as your foreman or forelady, who will preside over your deliberations, and who will sign any verdict to which all of you agree. It will be the duty of the one selected to serve as your spokesman in any further proceedings in this Court.

The person selected to act as foreman or forelady of the jury should permit a full and free discussion of the case by the jurors in the jury room. The other jurors should assist the foreman or forelady so selected in keeping the proceedings orderly and expedite the proceedings of the jury in the jury room.

If you desire to see any of the exhibits that have been introduced in evidence, you may advise the court crier of that fact, and that is Mr. Nevis, and the exhibits that you wish to see will be delivered to you in the jury room.

If it should become necessary for you to communicate

with the Court in any matter connected with the case while you are deliberating, I admonish you that you just not disclose to the Court—and remember this, whoever the foreman or forelady or anybody is of the jury—you must not disclose to the Court or to anyone else, to the crier or anyone with whom you are in contact with as you come in and out of the jury room into the courtroom, how you stand numerically. We don't want to know how you stand numerically. Don't come in and say we are locked eight to four one way or the other. Don't tell us that. We don't want to know how you stand until you finally reach the decision in this case. And you have to adhere to that admonition until you reach a verdict.

It will take all twelve of you to reach a verdict. When all twelve of you have agreed upon a verdict, that is the verdict of the jury.

The indictment in this case contains one count only. According to such view as you may take of the evidence, you may return a verdict of guilty or a verdict of not guilty, or you may disagree and fail to reach a verdict. I hope that you will be able to agree and reach a verdict, but the important thing is that you must follow the law and the evidence in this case, and in so doing, all twelve of you are unable to agree on a verdict, it is your privilege to so advise the Court. It is for this latter reason alone that I have mentioned your right to disagree.

Now, the clerk has prepared a form of verdict. This form of verdict has no significance in and of itself, and is not to be considered by you for any purpose other than as a convenience for your use. This form of verdict as prepared by the Clerk reads:

United States District Court for the Northern District of California, United States of America versus Cecil J. Bishop. And then the action number.

We, the jury, find Cecil J. Bishop, the defendant at the bar, blank as to count one.

Now, as I previously stated, you are to consider each one of these counts as a separate charge against the defendant. In other words, you treat it as if it is the only charge that you have. And then you treat the next one as if it is the only charge you have. And then the third one as the only charge. So, we the jury, find Cecil J. Bishop, the defendant

at the bar, blank as to count one, whatever you find, not guilty, guilty, or unable to agree on a verdict.

Then you treat count two the same way and count three. You will see these blanks are there. Then whoever the foreman is will date it over in the lower left-hand corner and then he will sign in the right-hand corner. When you reach that point, rap on the door and the marshal or the crier will come and bring you in.

Will counsel please approach the bench?

(Whereupon the following proceedings were held outside the hearing of the jury:)

THE COURT: Now, does the Government have any objections or exceptions to the instructions as given?

MR. KILGARIFF: No objections or exceptions.

THE COURT: Mr. Johnston, I understand that you do have certain exceptions and objections to the instructions. I will let you state them now.

MR. JOHNSTON: Yes, Your Honor. The defense objects to the Court's failure, refusal to give instructions proposed by the defendant relating to the lesser included offense. I am referring specifically to the defendant's requested instructions number 27, 28, 29 and 31. These instructions are to the effect that if the jury fails to find the defendant guilty under Section 7206(1) that they might find him guilty under Section 7207, which indicates the offense wilfully delivering a false return. Briefly stated, the grounds of our objection is that Section 7207 creates an offense that is a lesser included offense under Section 7206(1) in that not only does 7207 not contain any requirement that the return be verified under penalties of perjury, but also more specifically that under a long line of reported cases the word wilfully as used in a misdemeanor tax section has a different and lesser meaning than the same word when it is used in connection with a felony offense. It is our position that the jury might find the defendant to have possessed the requisite degree of wilfulness to constitute the misdemeanor offense but not sufficient to constitute the felony offense.

THE COURT: All right. Thank you.

MR. JOHNSTON: I have one other point, Your Honor. I noted that instruction of the jury as to the statute involved, which was the subject of the Government's proposed instruction number three, that Your Honor quoted the in-

struction but substituted the word offense for the word felony.

THE COURT: Yes, I always do that. I do not put in the nature of the crime. I paraphrase it and eliminate the word felony or whatever the particular crime. I merely state it is an offense.

MR. JOHNSTON: Well, I don't think this is grounds for objection although I would prefer to have the jury told——

THE COURT: I never do that.

MR. JOHNSTON: ——the offense is a felony.

THE COURT: I don't do that. As a matter of fact, I am surprised that the Government submitted the instruction in that form because normally the Government doesn't put in the felony and you normally paraphrase that and put in the word offense.

MR. KILGARIFF: That's right.

THE COURT: So in any event, I did that purposely.

MR. JOHNSTON: All right. Very well, Your Honor. Thank you.

THE COURT: All right. Now, the record will reflect that the question of allowing the lesser included offense instruction was discussed with counsel and I have briefly expressed with counsel my intention not to give those instructions and my authority for doing so is the Escobar case and also the Sansone case which is cited in the Escobar case.

Further in this particular case, there is no question but the fact of the defendant's signature of the income tax returns under penalties of perjury has been admitted. This is not a fact in evidence. I don't think it's an appropriate application of the rule. That is my excuse for not giving a lesser included offense instruction such as suggested by defense counsel. Moreover, I feel that I am bound by the rule of Escobar. So you now made your record.

MR. JOHNSTON: Yes, Your Honor.

MR. KILGARIFF: Thank you.

(Whereupon the following proceedings were held in the presence of the jury:)

THE COURT: All right. Now, the jury will retire and deliberate upon their verdict. Before you do so, we have come to a sad moment. We must excuse Mrs. Klaner.

Mrs. Klaner, you get full pay for coming here today just to hear me talk for an hour.

JUROR: I am a Government worker.

THE COURT: Oh, it is pay already. Thank you for coming. You are excused and have a merry Christmas.

All right, ladies and gentlemen, you may now retire and deliberate upon your verdict.

(Jury retired to deliberate.)

THE COURT: Now, gentlemen, I am going to give the jury that instruction that you fellows put together. This is defendant's requested instruction number thirty-two. I think they should have this for the reason this contains the figures and the items upon which they will be deliberating. I note I have made an interlineation here on line 21. I added the words "The above." My writing is so poor that I am going to have my secretary erase it and type it in. As soon as that is done, I will give it to the jury. Any objection?

MR. JOHNSTON: No objection.

MR. KILGARIFF: No objection.

THE CRIER: They would like to have the exhibits.

THE COURT: All right. Give them the exhibits. We will be in recess until the jury returns with a verdict.

(Recess.)

THE CLERK: U.S. versus Bishop.

THE COURT: The record will show the jury is all present; the defendant is present with counsel.

Ladies and gentlemen of the jury, it is my understanding that you have reached a verdict; is that correct?

FOREMAN: Yes.

THE COURT: Who is the foreman? Mr. Knoles, will you present the verdict to the marshal?

(Verdict handed to marshal.)

THE COURT: All right, Mr. Clerk, will you read the verdict, please?

THE CLERK: Ladies and gentlemen of the jury, harken to your verdict as it shall stand recorded. It reads as follows: We, the jury, find Cecil J. Bishop, the defendant at the bar, guilty as to Count One, guilty as to Count Two, guilty as to Count Three. Signed, Rexx Knoles.

JUDGMENT AND COMMITMENT (REV. 2-68) CR. FORM NO. 25

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
v. } No. Cr. 14897
CECIL J. BISHOP

[Filed Feb. 16, 1971, Clerk, U.S. District Court, *Eastern District of California,* By ....., Deputy Clerk]

On this 11th day of February, 1971 came the attorney for the government and the defendant appeared in person and by J. Richard Johnston, Esq., Counsel.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty & a Verdict of Guilty has been convicted of the offense of Violation of Title 26 USC, Section 7206 (1)—Willfully Subscribing and Making False Returns as charged in the Indictment (3 Counts) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS as to each Count, such sentences to run concurrently with each other; the first NINETY (90) DAYS of each sentence to be spent in a jail type institution & these sentences also to run concurrently with each other. Remainder of each sentence hereby suspended & defendant shall be placed on probation for a period of FIVE (5) YEARS, following jail term, which is to be served during FORTY-FIVE consecutive 48-hour weekends. As a condition of probation, defendant shall pay a fine in the sum of FIVE THOUSAND ($5,000.00) DOLLARS within SIX (6) MONTHS after implementation of sentence.

IT IS ADJUDGED that Execution of sentence is hereby

stayed pending outcome of appeal & defendant is hereby released on his own recognizance.

Entered in Criminal Docket Feb. 16, 1971

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Thomas J. MacBride
United States District Judge

/s/ William C. Robb
By: .....
Clerk

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 71-1698

UNITED STATES,
PETITIONER,

v.

CECIL J. BISHOP

ORDER ALLOWING CERTIORARI. Filed October 10, 1972.
The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. Government Printing Office: 1972—487-701/287